NOVA METHODUS DISCENDAE DOCENDAEQUE JURISPRUDENTIAE

EVERY century or two, during the past millennium, a new method in the teaching of Law has appeared, to supplant or to modify the hitherto accepted system. The new method may not have been, in an absolute sense, an advance. Progress is always relative, — relative to the conditions and needs of the time. New conditions require changed methods. And so, in the ripeness of time, some new method has arisen, to supply an apter tool for newly felt needs.

I

On the Continent

About the time when Abelard was revolutionizing the methods of Theology at Paris, Irnerius was setting a new ensample for Law at Bologna, somewhere at the end of the 1100's.[1]

After two centuries, when the possibilities of his method had been exhausted, the next universally accepted method was that of Bartolus, whose fame gave currency, in the 1300's, to the maxim "*Nemo bonus jurista nisi Bartolista.*" [2]

After another two centuries the Humanist doctrine, led by Alciat, pointed the way again to a new method; the older one had outlived its usefulness. This time the congenial soil was France; and, under Cujas and others, the "mos Gallicus" came to supplant the "mos Italicus." To fulfill its destiny, another two centuries were required.

Meantime legal science was springing up in Germany; and the reception of Roman Law there, achieved in the 1500's, offered a fresh field for the struggle between the old and the new methods.

[1] There is an impressive modern fresco, idealizing this famous teacher and symbolizing his work, on the ceiling of the Palazzo del Podestà at Bologna. No portrait or sculpture of his features is extant.

[2] Tribute has been paid recently to some of his achievements by my distinguished classmate Beale's volume, Bartolus on the Conflict of Laws, transl. 1914; Treatise on the Conflict of Laws, 1916, § 26; and the six hundredth anniversary of his birth was celebrated in 1914 by the universities of Italy.

But other influences in turn were rising, — the contrasted but complementary influences of Natural Law and of Nationalism; and in the 1600's and the 1700's they became dominant. Broader and at the same time more practical features of law were now conceived as composing legal science in general. New methods were needed.

In 1667, LEIBNITZ published his essay, "Nova Methodus discendae docendaeque Jurisprudentiae."[3] He was but twenty-one years old; the vast science of law was thus (in Hallam's phrase) "invaded by a boy."[4] He divided it into four parts or modes, — didactic, historic, exegetic, and polemic; and for each part he described the kinds of materials that should be used for study and the way of using them. Though his influence on educational method apparently did not extend beyond Germany, nevertheless he anticipated the great movements of the next two centuries, — national codification, for example, in the 1700's, and the historical school in the 1800's. His proposed "Novum Corpus Juris," or Justinian Rearranged, was first realized a century later in France, by Pothier. The polemic moots which he recommended are perhaps the precursors of von Ihering's practical exercises, introduced only in the last generation. His projected "Theatrum Legale" was an anticipation of the processes of Comparative Law which have come to pass only in the days of Maine, Kohler, and Dareste;[5] and, curiously enough, the Socratic method, as applied in the Harvard Law School under Ames and Keener, is foreshadowed in his preface.[6]

II

IN ENGLAND

In philosophic stimulus Leibnitz owed much to Bacon's "Novum Organum." Insular England had meanwhile been developing its own system of legal education, — the Inns of Court, with their

[3] 4 OPERA OMNIA, ed. Dutens (Geneva, 1768), 159. I desire to acknowledge the courtesy of the Librarian of Harvard University in lending me this volume.

[4] Moreover, the added marvel is (as Wolf tells us) that he composed it "in itinere omni librorum apparatu destitutus."

[5] "Ex his aliisque omnibus [gentium moribus] undecunque collectis, Deo dante, conficiemus aliquando *theatrum legale*, et in omnibus materiis omnium gentium, locorum, temporum placita παραλλήλως disponemus " (§ 29).

[6] "Judicium enim, etsi ante annos non veniat, potest tamen et in pueritia interrogando excitari; hoc enim voluit Platonis reminiscentia, exhibitumque specimen in

Moots. Here, as in everything, the British change was slower, and less radical when it came.

At a very early period the Inns of Court were, in effect, organizations clustering around the professors of the common law at London, maintaining its teaching and practice.[7] But, by the end of the 1500's they had lost this character, and up to the first half of the 1800's systematic legal education in England was stagnant. What was given at the universities does not seem to have had any value placed upon it. Lord Brougham once said,[8] "I won't say it's a humbug; but it's something very like it. When I was attending lectures on the civil law in Edinburgh, they were all in Latin. A set of Latin questions were proposed after the lecture to the students. Very difficult, indeed, some of them might be to answer, if a proper answer were required; but all we had to do was, if the question commenced with 'Nonne,' we said 'Etiam'; and if with 'An,' we replied, 'Non.'" The office of a practising lawyer was the only place in which the law could be learned, if at all. The eminent authority just mentioned thus sketched the process of legal apprenticeship in his day: "It is a most melancholy state of things. There is nothing like education for law students now. When I was in the chambers of Mr. (afterwards Chief-Justice) Tindal, we seldom or never saw our master; we were told, 'Copy whatever you can lay hold of,' and with that injunction we were left to ourselves." [9] Professor Dicey added his testimony concerning the state of affairs even in the '70's: "He is put to make bricks without straw, or rather without having even been taught how bricks are to be made. The oddity of the thing is that he, after all, gets in due time, mainly by the process of imitation, to make pretty tolerable bricks." [10]

Towards the middle of the 1800's an effort began to devise some-

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Menone, ubi puerum Socrates a primis sensuque manifestis, nihil docens, interrogando tantum ad ea deducit quae vel subtilissimo cuique negotium facessant: incommensurabilitatem scilicet diagonii et lateris in quadrato."

[7] FORTESCUE, DE LAUDIBUS, c. 48–9; 1 GNEIST, ENGLISH CONSTITUTION, 393; FOSS, JUDGES OF ENGLAND, II, 201, IV, 249; REPORT OF HOUSE OF COMMONS COMMITTEE ON LEGAL EDUCATION, 1846, 6; 1 BLACKSTONE, COMMENTARIES, 23.

[8] 12 LAW REVIEW, 114.

[9] "I myself read no treatises. . . . I learned law by reading the reports and attending the courts," said Chief Baron Pollock to his grandson, now Sir Frederick Pollock, Bart. (FIRST BOOK OF JURISPRUDENCE, 3 ed., 313.)

[10] 25 MACMILLAN'S MAG., 127, 209.

thing more helpful and better suited to the professional dignity of law. The matter was taken up by the Society for the Amendment of the Law and was vigorously discussed. A committee of inquiry of the House of Commons was appointed in 1846 to report on the state of legal education; and a commission, including Vice-Chancellor Wood and Sir John Coleridge, was appointed in 1855 to report on the Inns of Court. Both these bodies recommended the establishment of a University of Law, under the control of the Inns. But the outcome seems to have been not much more than a zealous increase of the number of lectures by the Readers of the Inns. The old system was revivified, not materially altered. Apparently it was a case of "muddling through."

In 1871 (when Mr. Langdell's incumbency in the Harvard Law School had but just begun) Mr. Bryce and Mr. Dicey came to the United States and visited several law schools. The Columbia Law School received from them the most favorable comment;[11] at the head of it was then Theodore DWIGHT, a man of great personal magnetism and didactic skill. The idea of a University of Law was now again mooted by the Society for Legal Education, having at its head Lord Selborne, who carried through in 1873 the measure reforming the judiciary system. The principal material result seems to have been that the Readers of the Inns were replaced by Professors and Tutors, the number being increased. Among these were included, in 1873, such scholars as Amos, Broom, and Hunter, and, in 1886, Pollock, Bryce, and Harrison. But within the next fifteen or twenty years an extension of the number and scope of the subjects required for the law degree at the larger universities showed the wide workings of this spirit of improvement; and in 1883 appeared Mr. Dicey's plea for the teaching of English law at the universities.

Early in 1885 Mr. Finch visited the Harvard Law School; I remember that we students felt proud of the reason for his presence. On his return to Cambridge, England, his lectures then introduced what the Law Quarterly Review was willing to term "the method of Professor Langdell." In the fall of 1885 came Sir Frederick Pollock, and visited the Harvard Law School; and the impression produced on his mind by its method of instruction was an important influence (as he tells us in the preface to his "Treatise

[11] See 25 MACMILLAN'S MAG., 127, 209.

on Torts,") not only in his teaching but in his writing also. Mr. Finch later published a "Selection of Cases on the English Law of Contract, Part I," and an inaugural address on "Legal Education, its Aim and Method."

The important features of this fourth stage of legal education in England were: (*a*) the radical change in the source of instruction, — for it now began to be given at universities by scholars holding university professorships, instead of in London by barristers under the auspices of the Inns of Court; (*b*) the adoption of the Langdell method by Mr. Finch.[12]

III

In America

Meantime, a century before, America had already made its first contribution to Anglo-American method, — the law school. At Litchfield in 1782 (the old schoolhouse is still standing; you can buy a picture-card of its dilapidated modesty) the example was set by Reeve, and then by Gould. Harvard University now celebrates the hundredth anniversary of its own school, the oldest surviving one. There were other schools, which passed away, though notable in their day and region, — for example, those of Nicholas, Pirtle, and Robertson at Lexington, Kentucky (afterwards Transylvania University). But the didactic type was the same — set lecture and memorized treatise, or both, — though Smith's "Leading Cases" had long hinted at other possibilities.

Then came Christopher Columbus Langdell, with the insight of genius into the spirit and needs of Anglo-American legal sources.

IV

The Langdell Method as a World Method

It has always seemed to me that Langdell's method was an unconscious product of the scientific spirit of realism — that realism which was then just beginning to obtain the dominance now universal, — the scientific realism of Darwin, Comte, and Spencer, which has gradually spread into Art, Religion, and Industry. Of this aspect of his method, he himself may or may not have been

[12] The foregoing page or so has been lifted without quotation marks (but with slight revision) from an editorial note in the first volume (1887) of this Review, 297. But to deflect the sleuth of plagiarists, let me confess that the anonymous author was myself. At the time I felt rather pleased with this editorial début.

conscious; but it was conceived in the spirit of looking at the ultimate facts as they are and of treating them inductively.

But I think that he must indeed have been conscious of the relation of his ideas to the modern movement of Science; for his formal exposition of principles, delivered at the Two Hundred and Fiftieth Anniversary Celebration, in 1886, begins with the mighty sentence: "LAW IS A SCIENCE!"

I was present, as a student, on that occasion; and often, in the ten years thereafter, when arrayed in the ranks of militant disciples of his method, I recalled that deliverance. To me it has the sonorous ring of a new gospel, the utterance of a prophet and a seer. In its rhetoric, as in its philosophic significance, it is, for us lawyers, what John's utterance ("not to speak it profanely") was to the theologians: "God is a Spirit, and they that worship him must worship him in spirit and in truth."

And it was a daring thing to say, in those days. His hearers believed in *him;* but I doubt if many of them believed in his utterance, or even grasped its full truth. The profession (let us acknowledge it) does not yet believe. For some years past, I have ventured to try the phrase "legal science" in this or that professional connection; and ever I find but a philistine reception for it. Outside of our profession, there is even less readiness to concede such a status to Law. Recently, before a Science Club, composed chiefly of professors in the natural sciences, I delivered, by request, an address on the topic, "Law as a Science, and its Methods Compared with those of Other Sciences." It was evident (at the outset, certainly) that any exponent of such a theme must yet expect to be on the defensive in claiming a genuine place for Law as a science.

Langdell's great truth, so boldly affirmed now thirty years ago, has another generation to run before it becomes a truism in Anglo-America.

His method, however, — the method founded on that truth, — has already been accorded universal acceptance. And if, beyond its native soil of America, it has received as yet only theoretical approval, in England and other countries of Anglo-American law, that is only because of temperamental obstacles to the free Socratic style of discussion which incidentally has gone with it,[13] and be-

[13] Mr. Dicey pointed this out thirty years ago (2 L. QUART. REV. 88); and contemporary witnesses report little change today.

cause of the naturally slow spread of a truth beyond national borders in an applied science.

But its career is not to be bounded by the realms of Anglo-American law. In its emphasis on the inductive process in legal pedagogy, it has yet a solid service to perform in Continental law. Some of us are fond enough to believe that it will still play its part in all of Western Europe, — the countries now fettered in method by their codes and by other traditions. The exclusively dogmatic method has inherent shortcomings. There is both room and need, in their system of education, for inductive training. The Langdell system would supply that need. Therefore I believe that it will be adopted and adapted, in due course of destiny.

Signs have appeared there, for some time, of a readiness to appreciate this. In the history of Law, some have long ago begun to use it, in such works as Girard's "Textes du droit romain" and Lörsch and Schröder's "Urkunden zur Geschichte des deutschen Privatrechts." They use it in practice manuals. And they are ripe to use it in the substantive law. What they now need is merely some demonstration of its possibilities in a class-room. Whether that will come about through the missionary work of some European students who have learned the method here, or through the example of some future American exchange professors, remains to be seen. But one may have faith that the need will be some day duly supplied, and that the Langdell method will complete the circuit of that world-influence which it merits.

This would be no more than the repetition of history. For all the great changes of method have spread only slowly from the country of origin to other countries. The "mos Italicus" took its time in reaching France; the "mos Gallicus" found acceptance only later in Germany and Holland; and Savigny's historical method had to wait before it commanded universal adherence in other countries.

V

Has the Time Arrived for a Newer Method?

In the country of its origin, time enough has not elapsed for the need of a new system to develop. The other great methods ran their race for two centuries or more. But has not time enough elapsed at least for the development of new applications of it?

We must remember two things, in this matter of time.

(1) One is that the Langdell method was belated. It came nearly a hundred years — perhaps more — behind its time. English law had long been based chiefly on judicial judgments. For nearly three centuries the reports of cases had been fairly ample. But since the very early 1800's (when Campbell began his Nisi Prius reporting) they had been copious. The method might have been aptly used at any time since (say) 1820, at least. Of course, there was reason enough for the delay. But, so far as concerns its aptness, a method which assumed that the main and ample sources of law for scientific study were printed reports of judgments would have been fully practicable at that date. The facts of law, in short, which the method fitted, were already facts a century ago.

(2) The second thing is that during that century legal conditions in America have ceased to be static. Of course, they are never absolutely static. But the movements of law are apt to be like those of a large river. It may flow on a broad level bed for many miles; the conditions of its movement are the same, in that stretch. But then the level of the country subsides abruptly; a defile is reached; and the smooth stream breaks into a swift torrent of tumultuous rocky rapids; until finally the volume of water demanding exit arrives at rest once more on the lower level in open country. Theoretically a river may descend peacefully (like the Amazon) through its entire length, from mountain to ocean. Practically, most rivers have these occasional sudden stretches of rapid change to the next level. So with Law. But, not to press the analogy too far, the period from 1800 to 1900, in American law, has been on the whole a period of gradual placid progress, through judicial logic and occasional legislative amendment. The present years, however, see us entering on a period of more or less radical change.

Moreover, social change in these days being more conscious than ever before, legal change is likely to be more rapid. The speed of evolution of humanity has increased enormously in ratio with the lapse of time. Paleontologists tell us, for example, that during the Third Interglacial and the Fourth Glacial periods of the world (represented by the Piltdown and the Neanderthal races of men) the time that elapsed was some 125,000 years; but that the entire human progress in the arts of life, made in that immense period, was represented only by improved methods of chipping the surface

of flints for the making of tools. The enormous increases, in the last twenty-five years, of modes of communication have resulted in almost corresponding growth in capacity for exchange, and therefore change, of social ideas. Hence, a change of conditions which might have required a century of time in the 1400's, or even the 1600's, would not now be an anomaly in a quarter of a century.

For these reasons it would not be anomalous to find that a method of legal education, invented half a century ago, and even then half a century belated, might now already be mature for readaptation to new conditions.

What is there, then, in the method which could be supposed not to fit present conditions? It seems to me that one can put a finger on the precise place. That place is what may be called the minor premise of the Langdell syllogism. "First, Law is a Science," was the major syllogism; and no one can be hardy enough to question this. But "Secondly," he announced, "*all the available materials* of that science are contained in printed books," [14] *i. e. in reports of cases.* He did not *say* "reports of cases," but the spirit and the practice of his method were strictly thus limited.[15]

It is here that the doubt arises. Can we today concede that the reported judicial judgments are the sole sources for the science of Law? And if they are not, if there are other important sources, must not a sound method of legal education make regular use of them also? And, if so, what shall be those uses?

VI

The Six-Process Method

At this point let me preferably shift the order of thought, and make my proposals after setting forth my own notions of the fundamental processes of Law.

My thesis will be this: Law, as a subject of thought and activity,

[14] Harvard Law School Association, Report of the Organization and First General Meeting (Boston, 1887), 49.

[15] On this occasion the speeches all showed that such was the understood implication. Mr. Carter, *e. g.*, referred to "the great and principal cases in which are the real sources of the law" (p. 26). And such was the usage of the School at that time. It was, for instance, not thought necessary in 1887 for the Library to possess a complete set of the statutes of the several states. The main object was to get behind the treatises to the cases.

has several distinct categories or modes of being, and cannot be thought about except in one or another of these processes; hence, any curriculum of legal education must be based on these distinctions, by aiming to develop each process adequately.[16]

In a former number of this REVIEW [17] I was permitted to set forth a classification of Law into four branches, only two of which are here material. Law was classified according to the different activities of thought which deal with the fact of Law. Law, in the first place, may be conceived of as a thing to be *ascertained; i. e.* as a *mere fact* of human conduct; and Law, in the second place, may be conceived of as a thing to be questioned and *debated, i. e.* as a rule which by some standard *ought to be different* from what it is. The uncouth names given, for short, to these two general branches of legal science were Nomoscopy and Nomosophy; but the names are immaterial.

Now the *first* general branch has three subdivisions: (*a*) We may concern ourselves with ascertaining the *actual* rule of law of a given moment in a given country, by studying the sources in which that law is expressed; call this, Nomostatics. (*b*) We may concern ourselves with ascertaining the *former condition*, *history*, and *development* of a rule of law; call this, Nomogenetics. (*c*) We may concern ourselves with ascertaining the relation between Law and *other facts and their sciences;* call this, Nomophysics.

The *second* general branch above has two subdivisions: (1) We may take a standard of *logic*, analyze the rules of law, and examine their consistency as a system or part of a system; call this, Nomocritics. (2) We may take a standard of *ethics*, *economics*, or *politics*, and examine the rules of law with reference to their conformity to that standard; call this, Nomothetics or Nomopolitics.

But there is also a *third* general branch (not taken up in the above-cited article). We may take the Law of a given community, or one or more rules of it, and *compare* it with the law of another community, with reference to one or all of the above features, *i. e.* Comparative Law, or Supra-national Law.

What is the significance of these distinctions for legal education?

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[16] My conclusions will coincide in some respects with those of Professor Redlich, in his recent report to the Carnegie Foundation, but are reached by a different path.

[17] 28 HARV. L. REV. 1 (November, 1914); also in the writer's CASES ON TORTS, vol. II, Appendix A.

The significance of them is this: All of the above ways of thinking about Law are inherent and unavoidable, and are used in a lawyer's practical activity. Some are used always more than others, and some are used at certain periods of a nation's history more than others. But all are used, and all are necessary and inevitable. Hence, legal education should endeavor to train the student in the use of all of them, and not merely in one or two of them.

For educational purposes, then, how do they group themselves practically? That is, how far are they so distinct, in the mental processes involved, that practically they require separate attention in educational method?

Here, of course, experience as a student and a teacher comes into play. Speaking from such experience, I am convinced that there are substantially *six distinct mental processes*, which need separate attention and cultivation.

Without adhering formally, therefore, to the above artificial nomenclature, let me briefly set forth these six kinds of mental process which need to be cultivated in the embryo lawyer.

1. *Analytic process.* The first is the process of analyzing the judicial decisions, to determine the Law as it is, by tracing the logical implications of general principles as revealed in specific cases.

This process is what the case-study method provides for the student. And it is the *only* process (of the six) that it provides. Whether we are searching for the rule of mutual consent in contracts, or for the rule of liability of individual partners to firm creditors, or the rule of privilege for interested persons in defamation, or for any other actual rule of law, the process is always one of dissection or analysis, in logical detail.

This is indeed the process most used by practitioners in their ascertainment of the existing Law (Nomostatics). And in the past and present phase of our legal sources it is the most usually needed process. Therefore it calls for thorough mastery. And the great service of Langdell's method was and is that it supplies that mastery. But that process is not the only process of thought used and needed by the lawyer or the legal scholar. And in the coming state of our legal sources it will occupy, as a process, a place of less relative importance than hitherto (though still a larger place presumably than any one of the others). This was the shortcoming of the case-study method, — a shortcoming which in changed conditions may be termed serious.

2. *Historic process.* The second process of thought about Law is the thought of it as changing, moving, developing, from a past through a present into a future, — the historic process. This mode of thought becomes specially important to a lawyer in an epoch when his national law is in a period of rapid change, — that is, change maturing in his own lifetime. To any student it is an important intellectual stage when he first realizes that all law is in a state of constant motion, like a kaleidoscope. I do not remember just when this realization came to me; I know it was not while in the Law School; but as I look back, I note a great difference in all my notions about law since the time of that realization. I am convinced that the acquisition of it should be made at the stage of one's formal legal education.

Many have fondly believed that this can be done and is done by the case-study system. I doubt it. Something indeed can be done; but not enough. There are several reasons for this; to elaborate them would require too much space. But a most important one is that historic change of rule is the result always of causes, — causes more or less discernible but external; and the judicial opinions do not contain sufficient data of those causes. Who, for instance, could attempt to understand the causes that influenced the rule against general warrants, by merely reading Camden's eloquent opinions?

The historic sense is a necessary sense for the lawyer; and the case-study method does not supply data for its genuine cultivation.

3. *Legislative process.* A third process of thought about Law is the thought of it as something to be created, made by ourselves, and made to be perhaps different from what it now is, — in short, the legislative process. And, in a period of changing law, this too becomes an important process for the lawyer, — the most important in a civic sense.

Now the habitual analysis of judicial judgments does not in the least cultivate the acquisition of this process. The two are fairly alien to each other. One of the notable reasons for our American lack of legislative skill is that our judiciary committees of the legislature, who frame the statutes, are composed of men whose only training (hitherto) has been in the analysis of case-judgments. The really basic principles and problems that attend the legislative process have scarcely been dreamed of by our most competent practitioners. Any one who hesitates to accept so strong a statement

may be convinced by glancing at the current volume ("The Science of Legal Method") in the Modern Philosophy Series; or at the recent volume of Professor Ernst Freund of the University of Chicago, on "Standards of American Legislation."

The legislative process of thought about Law is necessary for the lawyer; and the case-study method does not cultivate it at all.

4. *Synthetic process.* A fourth process of thought about Law is the process of building up individual rules and principles into a consistent system — of being able to trace every rule backwards and upwards to its more and more general expressions and of harmonizing these, — in short, the synthetic process.

This process is needed and has always been used to some extent by lawyers. It characterizes the greatest of them in their arguments, and it ordinarily comes only at their maturest period. It represents their highest capacity. In a period of changing law it underlies the skill that is necessary in order to fit the new law well into the old, — like the skill of an architect restoring an old but solid building, who knows which beams, pillars, and girders are indispensable, and which ones can be removed without scruple.

The case-study method is capable, perhaps, of furnishing some of the material for this process. But it has ordinarily not been so used; in its ordinary use its service is purely or mainly analytic and not synthetic. The treatises on Analytic (thus miscalled) Jurisprudence purport to render the service; they represent synthesis. But their vogue has not been favored under the case-study system. The synthetic process of thought is often dismissed (as in a recent official utterance) with the epithet of "speculative jurisprudence." But its time must come, if our law is ever to be soundly reconstructed; and legal education must provide for this in its methods.

5. *Comparative process.* The fifth process of thought about Law is the process of looking outside our own actual law ("the" law), of conceiving a non-Ego in law, of realizing that other communities live and move under other legal systems, and that these must be reckoned with in the life of our own law among nations' laws, — in short, the comparative process. This consciousness of "a something not ourselves that makes for Law" (to paraphrase Matthew Arnold's phrase) — a sort of legal altruism, or anti-local spirit, — is an important one to acquire, especially in a period like the present. International relations are becoming more and more active

in daily commerce; and national insularization of law can no longer be reckoned upon.

Fortunately, our own federal form of national life has already tended strongly to cultivate in us this sense of law. The free comparison of common-law precedents from all the states has inevitably done this, even under the case-study method. Yet there remains the need of extending it to non-Anglo-American legal systems, and to the systems of law in other epochs.

The case-study materials, as hitherto provided, do not supply this need. Much remains to be done for cultivating the sense of national law as merely a member in the family of laws, — a family in which we must be prepared to seek harmonious adjustment and mutual profitable imitation.

6. *Operative process.* The sixth process of thought about Law conceives of law as being a nominal rule (as declared by courts and legislatures) which may in fact, however, not be enforced and practiced; it seeks constantly to keep aware of the gap, if any, between the nominal rule and the actual custom; it may be called the operative process. This is Professor Ehrlich's "living law." [18]

This is, in one sense, the "practical" side of law ("pragmatic" would more nearly describe it). It is often supposed to be taken care of by the so-called Practice courses; but that belief is an error. Those courses deal mainly with judicial procedure. The present process involves the substantive law. It concerns "practice," in that the attorney's intelligent advice to his client requires an acquaintance with actual commercial customs, and that this knowledge comes usually through practice only. In reality, this process concerns a specific and distinct conception of the Law, which is just as real and interesting for the scientific scholar as for the practitioner; and thus it ranks as a separate object of legal study, distinct from procedural skill and tact.

The case-study method does something for this object — perhaps a good deal — certainly very much more than in the code countries with which Professor Ehrlich is familiar and in which he saw the special need of study in this part of the field. For the case-reports contain copious data of actual commercial customs and of documents set forth verbatim. Again and again they exhibit edify-

[18] Set forth in his paper read at the 1915 meeting of the Association of American Law Schools.

ingly this contrast of light and shadow (so to speak), of law and custom. But what they do thus exhibit is only casual and scanty, in comparison with what could be and ought to be done. What ought to be done is, in every course, to provide a systematic apparatus of documents taken from today's customs of trade and industry, and to make occasional excursions of inquiry into statistics and other classes of facts. Thus only can this process of thought be adequately cultivated.[19]

Such are the six processes, or senses of Law, which legal education must be adapted to cultivate. How far does our present curriculum provide for them?

VII

A Reconstructed Curriculum

Taking the curriculum of the school with which I am most familiar, let us see how its courses of today distribute themselves with reference to their service in developing mainly one or another of the above six processes. They may be classified, roughly, as follows:

1. *Analytic process:* Contracts; Torts; Real Property; Common Law Procedure; Damages; Personal Property; Evidence; Quasi-Contracts; Agency; Commercial Paper; Crimes; Equity; Property II; Persons; Judgments, etc.; Public Officers; Carriers; Trusts; Insurance; Public Utilities; Equity Pleading; Bankruptcy; Suretyship; Constitutional Law; Property III; Criminal Procedure; Irrigation; Mining; Code Pleading; Mortgages; Municipal Corporations; Partnership; Federal Jurisdiction; — 33 courses, representing 84 semester hours.

2. *Historic process:* Legal Biography and History; Roman Law; Evolution of Law; — 3 courses, representing 6 semester hours.

3. *Legislative process:* Contemporary Legislation; Applied Criminology; Statute Law; — 3 courses, representing 4 semester hours.

4. *Synthetic process:* General Jurisprudence; Philosophy of Law; — 2 courses, representing 5 semester hours.

5. *Comparative process:* International Law; Roman Law; Conflict of Laws; Evolution of Law; — 4 courses, representing 13 semester hours.

6. *Operative process:* Conveyancing is virtually the only course directly aiming at this object. (But in any adequate method the

[19] At some more opportune time I should like to expound a method by which the practical obstacles to securing such an apparatus can be overcome.

process would form a fractional part in almost every course under 1 above; so that it cannot easily be compared in semester hours with the others.)

This survey shows that out of a total of some 112 semester units offered,[20] nearly five-sixths serve mainly or wholly the first above-named process, the analytic; while *all the other five processes together* are served (except incidentally, as noted under 2, 5 and 6) by only a little more than one-sixth of the units. Moreover, in the actual result this disproportion is increased; for since only 70 semester units are required to be achieved, and since in these 70 a minimum of 5 units only is required to be selected outside of the first group, the mass of students (following the orthodox lines) may and do content themselves with little more than that minimum (5 to 10 units) in making the selection. So that, in fact, more than six-sevenths of the education is spent in exercising the analytic process.

The question is, then, Is that enough? I am convinced that it is not. Even after all concessions made (*i. e.*, that the analytic process is the most common one for the practitioner, that it requires for its mastery long-continued and widely varied drill, etc., etc.), its share remains disproportionately large. That its mastery really needs, week after week for three years, in twenty-five or thirty different subjects, the repetition of that identical process of case-analysis, I have for some time ceased to believe. The same benefit could be obtained with less quantity of identical mental effort.

Moreover, the prestige given thus to the analytic process tends to repress in the student body an appreciation of the equal need of the other processes. The need for them is equal (though the quantity of exercise required may not be as much). But the orthodoxy of the first has thus far kept the others in the rank of heterodoxies. They should be given an equality of emphasis.

My proposal is, therefore, that the curriculum be re-grouped with reference to the above six distinct processes; that a better proportion be sought in distributing the pedagogic attention to them; that more suitable materials be devised for cultivating the five now heterodox processes; and that the required subjects be so enlarged that every student is certain to have had a fair elementary training in all of the processes.

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[20] The purely "Practice" courses have been omitted in the above grouping.

And now, in view of the skepticism which will doubtless greet this novel division into "processes," I venture, in its defense, to invoke analogy. No doubt (as the revered Professor Hill used to inculcate unsparingly) analogy is not argument. Nevertheless, it is often helpful and plausible. And I see a plausible analogy in physical training.

There are four processes or stages in physical training. (1) First come the individual muscles. We have at our disposal a score of different "chest-weight" exercises; each of them will reach a specific set of muscles. Suppose that we have carefully developed each one to a degree. (2) But we are yet unskilled in their coördination. Here the parallel bars, the horizontal bars, the rings, and other apparatus train us to use several sets of muscles at once, each playing a part and adjusting itself at the right moment to the others, to attain a total result. But thus far we are using muscles only. (3) The other bodily functions (lungs, stomach, etc.) remain to be drilled and coördinated with the muscles; endurance and economy of effort must be cultivated. Sparring, wrestling, fencing, track athletics, do this. They represent a stage beyond the former two. (4) But as yet the task is individual only. It must now become social. The whole skill of each Ego must merely contribute as a subordinate part of a larger whole. Team athletics supply this, — baseball, football, and the rest.

Here, then, are four distinct processes in athletic activity. No complete athlete can lack any of the four. Sound training must include specific and systematic attention to all four. A man who went no further than specializing in chest-weights would be athletically imperfect. And the most skilled team-player must possess a general foundation in individual muscle-development.

What I now point out, therefore, in legal education, is that, if these distinct processes be recognized to exist, each must be consciously cultivated by methods specifically adapted to that purpose.

VIII

Conclusion

To sum up: I invite assent to the following theses:

That Law is dealt with, in nature and in thought, by six distinct mental activities or processes, — the analytic, the historic, the legislative, the synthetic, the comparative, the operative;

That these six processes have greater or less importance at different epochs of a community's legal life; and that in our present epoch the second, third, fourth, and fifth have a relative importance which they have not had for a century past;

That the case-study method, as hitherto practiced, develops mainly the first only; and yet that method represents five-sixths or more of the student's activity under the ordinary curriculum of today; and that this is disproportionate;

That therefore greater relative place should be given to the others (relegating the analytic process to, say, one half of the course); and that more suitable methods and materials should be provided for their adequate cultivation.

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